ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

To: The Commission

PETITION FOR RECONSIDERATION AND FORBEARANCE

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SUMMARY

BellSouth Corporation ("BellSouth") seeks reconsideration of several aspects of the Commission's *Reconsideration Order* in this proceeding. In particular, BellSouth urges the Commission to exempt CMRS providers from any rate integration requirement, consistent with Congressional intent and the scope of the notice of proposed rulemaking in this proceeding. BellSouth also incorporates the arguments in its stay comments, including its formal request for Section 10 forbearance.

Extending rate integration to CMRS is inconsistent with the specific legislative intent underlying Section 254(g). According to the legislative history, Congress merely intended to codify the Commission's existing rate integration policy, which was inapplicable to CMRS. Extending rate integration to CMRS would also contravene the basic objective underlying the 1996 Act itself: to create a "pro-competitive, de-regulatory" telecommunications environment.

Subjecting CMRS to rate integration also violates the Administrative Procedure Act. There was no notice in the *NPRM* that the Commission proposed to extend its rate integration policy to CMRS carriers and their affiliates. As a result, there were no comments directed to this complex issue, and the *Report and Order* did not even mention that rate integration was being extended to CMRS carriers. Under these circumstances, the Commission cannot claim for the first time, in the guise of a "clarification," that its rate integration policy fully extends to the entire CMRS industry.

Moreover, CMRS rate integration will have severe adverse effects on consumers and the CMRS industry. The innovative wide-area calling plans that are a hallmark of this industry, and that are used by over 42,000 BellSouth CMRS subscribers, will be placed in jeopardy. These plans, like wireline EAS and ELCS arrangements, provide customers the benefit of having a wide toll-free calling area. The Commission should not jeopardize these plans by subjecting them to rate integration.

Cross-affiliate rate integration will, through a daisy-chain effect, require virtually the entire CMRS industry to stop competing with respect to interexchange service pricing and charge the same rates instead. The Commission's decision will undermine the procompetitive policies it has been pursuing for over a decade for the CMRS industry and will also undercut the market-oriented intentions of Congress in the 1996 Act.

At a minimum, if CMRS is subject to rate integration requirements, the Commission should:

- Clarify that CMRS carriers are not required to integrate optional toll-free calling plans allowing extended-area calling;
- Eliminate the current requirement of rate integration across CMRS affiliates;
- Allow CMRS providers to integrate their interstate interexchange rates for cellular and broadband PCS operations separately;
- Clearly define what constitutes an "interstate, interexchange" CMRS rate subject to integration; and
- Specify that CMRS providers have a transition period of at least one year to achieve rate integration.

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To: The Commission

PETITION FOR RECONSIDERATION AND FORBEARANCE

BellSouth Corporation ("BellSouth"), on behalf of its affiliates and subsidiaries, hereby petitions the Commission for reconsideration of its *Reconsideration Order*[1] in this proceeding pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429. In particular, BellSouth seeks reconsideration of the Commission's decision to subject commercial mobile radio service ("CMRS") providers to rate integration.

Interexchange CMRS rate integration will have severe adverse effects on consumers and the CMRS industry. The innovative wide-area calling plans that are a hallmark of this industry, and that are used by about 45,000 BellSouth CMRS subscribers, will be jeopardized. Cross-affiliate rate integration will, through a daisy-chain effect, require virtually the entire CMRS industry to stop competing with respect to interexchange service pricing and charge the same rates, and the Commission cannot confer immunity from antitrust liability for this price-fixing. The Commission's decision will undermine the procompetitive policies it has been pursuing for over a decade for the

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[1] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *First Memorandum Opinion and Order on Reconsideration*, FCC 97-269, 62 Fed. Reg. 46,447 (Sept. 3, 1997) (*Reconsideration Order*).

CMRS industry and will also undercut the market-oriented intentions of Congress in the 1996 Act. For these and other reasons, the Commission should reconsider and forbear.[2]

BellSouth urges the Commission, on reconsideration, to exempt CMRS providers from any rate integration requirement, consistent with Congressional intent and the scope of the notice of proposed rulemaking in this proceeding. At a minimum, if CMRS is subject to rate integration requirements, the Commission should take the following steps:

- Clarify that CMRS carriers are not required to integrate optional toll-free calling plans allowing extended-area calling;
- Eliminate the current requirement of rate integration across CMRS affiliates;
- Allow CMRS providers to integrate their interstate interexchange rates for cellular and broadband PCS operations separately;
- Clearly define what constitutes an "interstate, interexchange" CMRS rate subject to integration; and
- Specify that CMRS providers have a transition period of at least one year to achieve rate integration.

INTRODUCTION

In 1972, the Commission adopted a policy that required a provider of "domestic interstate interexchange service between the contiguous forty-eight states and various offshore points to integrate its rates for offshore points with rates for similar services on the mainland."[3] Under this policy, an interstate, interexchange provider was prohibited from providing service to their subscribers in one state at rates higher than the rates charged to their subscribers in another state.[4] Previously, service to Alaska and Hawaii was provided at international rates that were much higher than the 48-state domestic rates.[5] The policy was spurred by the development of satellite

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[2] BellSouth incorporates herein by reference the entirety of its Comments in support of the PrimeCo motion for a stay, filed September 29, 1997, including, in particular, BellSouth's formal request for forbearance under Section 10 of the Communications Act, 47 U.S.C. § 160.

[3] *Id.* at ¶ 2. *See, e.g., Domestic Communications Satellite Facilities,* Docket 16495, *Second Report and Order,* 35 FCC 2d 844, 856-57 (1972) (*Domsat II*), *aff'd on recon.,* 38 FCC 2d 665 (1972) (*Domsat II Recon.*), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975).

[4] *See Interstate, Interexchange Marketplace,* CC Docket 96-61, *Notice of Proposed Rule-making,* 11 F.C.C.R. 7141, 7180 (1996) (*NPRM*).

[5] *Domsat II,* 35 FCC 2d at 856.

communications which permitted the provision of interstate, interexchange service between the contiguous and non-contiguous states at roughly the same rate.[6]

Thereafter, in the *1976 Integration of Rates and Services Order*, the Commission required interexchange carriers offering message toll, private line, and specialized services to or from Alaska, Hawaii, Puerto Rico, and the Virgin Islands to integrate their rates for those services into the rate structures and uniform mileage rate patterns applicable to the mainland.[7] As a result of these decisions, interstate, interexchange providers were required to offer service to Alaska and Hawaii at the same rates available in the rest of the country. CMRS providers were never deemed interstate, interexchange providers subject to this policy, however, and the Commission has never engaged in CMRS rate regulation.

In the 1996 Act, Congress codified the Commission's policy in Section 254(g).[8] Nothing in the legislative history indicated that Congress intended rate integration to be applied more broadly. Moreover, CMRS is not mentioned in Section 254(g) or the legislative history.

In March 1996, the Commission issued a Notice of Proposed Rulemaking to implement Section 254(g).[9] The *NPRM* indicated that the Commission was adopting a rule to incorporate its rate integration policies.[10] No mention was made of departing from prior precedent and extending the rate integration policy to CMRS. The proposed rule appeared to simply continue the *status quo*

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6 *Id.* at 856-57; *NPRM*, 11 F.C.C.R. at 7180-81.

7 *See Integration of Rates and Services,* 61 FCC 2d 380, 383-84 (1976) (*1976 Integration of Rates and Services Order*).

8 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, sec. 101(a) (1996) ("1996 Act") (adding 47 U.S.C. § 254(g)).

9 *See NPRM*, 11 F.C.C.R. 7141, 7180 (1996).

10 *Id.* at 7181.

and no party submitted comments addressing the applicability of rate integration to CMRS. The Commission adopted the rules as proposed.[11] Again, CMRS is not referenced in the decision.

GTE requested reconsideration of the FCC's decision to extend rate integration to all affiliates and sought clarification that the term affiliates did not include CMRS affiliates.[12] CTIA made an *ex parte* presentation which pointed out that the CMRS was not covered by Section 254(g) because the statute merely codified the FCC's rate integration policy which had never been applied to CMRS.[13] Months later, the state of Hawaii made two *ex parte* presentations urging the Commission to require CMRS providers to integrate their rates.[14]

On reconsideration, the Commission expressly stated for the first time that rate integration applied to CMRS, stating, "the rate integration provision applies to all interstate interexchange telecommunications services and therefore requires CMRS providers to provide the interstate interexchange service on an integrated basis in all their states," but it allowed companies to integrate CMRS and wireline interexchange service separately, rather than across service boundaries.[15] It also clarified that "section 254(g) requires the implementation of rate integration across affiliates."[16] The FCC concluded that "affiliates" under common ownership and "control," as defined in Section 32.9000 of the Commission's rules, shall be required to rate integrate across affiliates.[17]

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11 *Interstate, Interexchange Marketplace,* CC Docket 96-61, *Report and Order*, 11 F.C.C.R. 9564 (1996) (*Report and Order*).

12 GTE Petition for Reconsideration and Clarification at 12 (Sept. 16, 1996) (GTE Petition).

13 *Ex Parte* Presentation of CTIA (Dec. 10, 1996).

14 *Ex Parte* Presentation of Hawaii (Apr. 2, 1997); *Ex Parte* Presentation of Hawaii (July 17, 1997).

15 *Reconsideration Order* at ¶ 18.

16 *Reconsideration Order* at ¶ 16.

17 *Reconsideration Order* at ¶ 17.

DISCUSSION

I. CMRS SHOULD NOT BE SUBJECT TO THE RATE INTEGRATION REQUIREMENT

A. Congress Did Not Intend to Subject CMRS to Rate Integration

Extending rate integration to CMRS is inconsistent with the specific legislative intent underlying Section 254(g). According to the legislative history:

> New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers. *The conferees intend the Commission's rules to require geographic rate averaging and rate integration, and to incorporate the policies contained in the Commission's [1976 Integration of Rates and Services Order].*[18]

Thus, the 1996 Act merely codified the FCC's rate integration policy and did not require the FCC to impose any new obligations. Accordingly, the Commission's extension of rate integration to CMRS is inconsistent with the specific legislative intent underlying Section 254(g). Congress merely codified the FCC's rate integration policy, which has never been applied to CMRS.

Extending rate integration to CMRS would also contravene the basic objective underlying the 1996 Act itself: to create a "pro-competitive, de-regulatory" telecommunications environment.[19] Consistent with this objective, the statute provides for regulatory reform and forbearance[20] and sought to eliminate micromanagement of the telecommunications industry.[21] The drafters of the Act recognized that "We can no longer keep trying to fit everything into the old traditional regulatory boxes — unless we want to incur unacceptable economic costs, competitiveness losses, and deny

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[18] H.R. Conf. Rep. No. 104-458, at 132 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 143-44 (emphasis added) ("Joint Explanatory Statement").

[19] Joint Explanatory Statement at 113.

[20] *See* 47 U.S.C. §§ 253, 160, 161.

[21] *See* 141 Cong. Rec. S7885 (daily ed. June 7, 1995) (statement of Sen. Pressler).

American consumers access to the latest products and services."[22] Yet the FCC here has stuffed CMRS providers into "regulatory boxes" designed for nationwide and offshore providers of wireline long-distance service. This is completely inconsistent with the pro-competitive, de-regulatory nature of the 1996 Act and runs counter to Congressional intent. Furthermore, as discussed below, mandatory rate integration for CMRS interexchange service will jeopardize the availability of wide-area calling plans, contrary to the intention of Congress to make such plans *more widely* available.

B. Application of Rate Integration to CMRS Violates the APA's Requirement of Notice and Comment Rulemaking and Lacks a Record Basis

Section 553(b) of the Administrative Act requires that an agency must provide adequate notice of what it proposes to accomplish in a rulemaking:

> General notice of proposed rule making shall be published in the Federal Register .... The notice shall include —
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) *either the terms or substance of the proposed rule or a description of the subjects and issues involved.*[23]

The purpose of the notice requirement in Section 553(b) is to permit potentially affected members of the public to file meaningful comments, which can only be done if the full scope of the agency's proposal is known. The legislative history of this section indicates that agency notice "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."[24]

In this case, there was no notice in the *NPRM* that the Commission proposed to extend its rate integration policy to CMRS carriers and their affiliates. As a result, there were no comments directed to this novel and complex issue, and the *Report and Order* did not even mention that rate

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22 *Id.* at S7886.

23 5 U.S.C. § 553(b) (emphasis added).

24 S. Doc. No. 79-248, at 200 (1946).

integration was being extended to CMRS carriers. Under these circumstances, the Commission cannot claim for the first time, in the guise of a "clarification," that its rate integration policy fully extends to the entire CMRS industry. This would amount to the promulgation of a new substantive rule without notice and comment rulemaking, in violation of the APA.

1. The Scope of the *NPRM* Did Not Extend to CMRS

The Commission's *NPRM* did not "fairly apprise interested parties" that the agency was proposing to extend rate integration to CMRS providers for the first time in a way that permitted them to "present responsive data or argument relating thereto," as the APA requires.[25] A fair reading of the *NPRM* would have indicated no more than that the Commission was codifying its existing rate integration policies, which did not apply to CMRS providers.

The *NPRM* was issued in response to Section 254(g) of the Telecommunications Act of 1996, which directed the Commission to adopt rules to require interexchange carriers ("IXCs") to integrate the rates they charge for service. In implementing this section, Congress stated that its intent was simply to incorporate into the Communications Act the existing policy of rate integration for interexchange, or long distance, telecommunications rates, as discussed in the following section.[26] That policy, which "was developed to provide, in phased reductions, *interstate MTS and WATS service* to and from Alaska at rates comparable to those prevailing in the contiguous states for calls of similar distance, duration, and time of day,"[27] has heretofore never been applied to CMRS carriers, who have never been viewed as providers of MTS or WATS service, even when they provide interexchange service to CMRS customers as part of a service package.[28]

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25 *Id.*

26 *See* Joint Explanatory Statement at 129, 132.

27 *GCI v. Alascom Inc.*, 2 F.C.C.R. 6479, 6481 (1987) (emphasis added).

28 Indeed, a review of applicable case law cited by the Commission fails to reveal a single case which even mentions CMRS in the context of rate integration. *See, e.g., Domsat II,* 35 FCC 2d at 856-66; *Domsat II Recon.,* 38 FCC 2d at 695-96; *1976 Integration of Rates and Services Order,* 61 FCC 2d at 383-84; *GCI v. Alascom Inc.,* 2 F.C.C.R. at 6481; *Motion of AT&T Corp. to be*

The *NPRM* stated that "the Commission has long maintained a rate integration policy for interexchange rates between the 48 contiguous states and various non-contiguous United States regions."[29] Accordingly, as guided by Congress and the 1996 Act, it proposed to codify this policy in a rule requiring that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[30] There was no indication, even by implication, that the Commission was contemplating extending the scope of its long-standing rate integration policy for wireline interexchange carriers to CMRS carriers for the first time.

The comments reflect this lack of notice. Not one party specifically commented on the issue of extending rate integration to CMRS carriers.[31] Given the extremely significant consequences of applying a rate integration policy to CMRS, the lack of comment conclusively demonstrates that the scope of the NPRM did not sufficiently apprise members of the public that the Commission intended

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Reclassified as a Non-Dominant Carrier, Order, 11 F.C.C.R. 3271, 3330 (1995) (*AT&T Non-Dominance Order*). By the same token, the Commission has promoted the establishment of wide-area CMRS calling plans and has never subjected such plans to rate integration. *See Craig O. McCaw*, 9 F.C.C.R. 5836, 5851-52, 5859-60, 5872-73, 5877, 5879-80 (1994), *recon.* 10 F.C.C.R. 11,786, 11,800 (1995) (subsequent history omitted); *Bloomington-Normal MSA Limited Partnership*, 3 F.C.C.R. 3743, 3745 (MSD 1988); *Interconnection and Resale Obligations Pertaining to CMRS*, CC Docket 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R. 9462, 9498 (1996) (*CMRS Interconnection Second Report*) (separate statement of Commissioner Chong).

29 *NPRM*, 11 F.C.C.R. at 7180.

30 *Id.* at 7181.

31 AMSC Subsidiary Corporation filed comments urging the Commission to forbear from applying the rate integration requirement to AMSC's provision of mobile satellite services ("MSS"). *See* Comments of AMSC Subsidiary Corporation at 1 (filed Apr. 19, 1996). AMSC did not oppose rate integration on the basis that its service was CMRS. Rather, AMSC urged the Commission to forbear from applying rate integration to MSS because it was unique. AMSC Comments (Apr. 19, 1996). AMSC only discussed CMRS with regard to the Commission's proposal to forbear from tariff regulation. AMSC Comments (Apr. 25, 1996). Given the fact that the rate integration policy was initially developed to integrate the rates of any carrier that provided domestic satellite service between the contiguous forty-eight states and various offshore points, *see Domsat II*, 35 FCC 2d at 856-66; *Domsat II Recon.*, 38 FCC 2d at 695-96, this hardly put parties on notice that the Commission was considering extending the policy to CMRS carriers.

to extend rate integration to CMRS. Here, the FCC's notice was inadequate because the divergence between the proposed action — codifying the Commission's existing rate integration policy which had never been applied to CMRS carriers — and the final action — extending the policy to CMRS — was so great that the CMRS carriers affected by the final action had no way of knowing that the FCC was considering such a critical change.

The courts have held that the fact that comments fail to deal with the substance of a final rule is an indication that notice was inadequate. For example, in *Mobil Oil Corp. v. FPC*,[32] the appellant challenged a rate-setting order of the Federal Power Commission. The original notice did not mention that the agency intended to rule on the setting of rates of liquids through pipelines, and as a result none of the comments received dealt with the issue. The court held:

> None of the commenting parties presented any data regarding pipeline costs . . . [or] what proportion of costs should be allocated to the transportation of liquids and liquefiables if the Commission chose to adopt such a policy. . . . From the nature of the comments received, it is clear that none of the interested parties felt, at least initially, that the rule-making proceedings then underway would result in allocating an actual proportion. There was even less reason for anyone to think that the Commission would set specific rates for the transportation of liquids and liquefiables, since there was no mention of rates in the proposal for rule-making. The interested parties undoubtedly felt that they were commenting on a "general policy" — as it had indeed been described in the published proposal.[33]

Similarly, here, none of the commenting parties addressed the issue of extending the rate integration policy to CMRS, indicating they were unaware the issue was before the Commission. As the court intimated in the *Mobil Oil* case, such a failure to properly notify the public as to the scope of the proceeding is contrary to Section 553(b)(3):

> From the record it appears probable that the FPC did not even comply with the minimal requirements of section 553. Section 553 requires in part that notice shall be given of the "terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1970). In this case the parties were informed that the proceedings would be to consider the advisability of

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32 483 F.2d 1238 (D.C. Cir. 1973).

33 *Id.* at 1244.

> establishing a general policy of allocating costs to liquids and liquefiables. . . . The resulting rule established specific rates for these commodities. . . . Although there is certainly no requirement that the resulting rule conform precisely to that which is proposed, there is a serious question whether sufficient notice was given in this case.[34]

This is a clear case, then, of the FCC failing to provide notice that an existing policy would be applied to a previously excluded class of service providers. Such attempts by the Commission have previously been rejected by the courts.[35]

Because CMRS rate integration is a new requirement that was not within the scope of the proposed rule, the FCC was precluded from adopting it based on the *NPRM*. Neither the *NPRM* nor even the *Report and Order* gave any indication that the Commission was proposing or adopting this change.[36] The FCC must "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[37] This the FCC did not do.

CMRS came into this proceeding only through the back door. GTE filed a petition for reconsideration and clarification of the Commission's decision to adopt a broad affiliation rule that would require its Marianas subsidiary to be rate-integrated with other GTE subsidiaries. Accordingly, GTE asked whether this rule was so broad in scope as to extend to all other holding companies and their subsidiaries, as well, including CMRS providers, or just those carriers providing facilities-based interexchange services to or from particular offshore points.[38] Thus, the CMRS issue was raised almost in passing for the first time on reconsideration, and even then it was mentioned

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[34] *Id.* at 1251 n.39.

[35] *See Glaser v. FCC*, 20 F.3d 1184, 1188 (D.C. Cir. 1994); *see also Reeder v. FCC*, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989). Although courts have allowed agencies to deviate from the original proposal when the changes are a "logical outgrowth" of the proposal, the Commission did not give notice that it was even considering the possibility of deviating from its long-standing policy of not extending rate integration to CMRS. *See, e.g., Natural Defenses Resource Council v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988).

[36] *See Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019-1020 (3d Cir. 1972).

[37] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 899-900 (D.C. Cir. 1978).

[38] *See* GTE Petition at 11-12.

only to illustrate the need for clarification of the affiliation rule as it applied to traditional interexchange carriers utilizing a holding company organizational structure.

Solely in response to the GTE petition,[39] the Commission for the first time announced in its July 1997 *Reconsideration Order* that it would apply its rate integration policy to CMRS carriers and their affiliates, concluding that "the rate integration provision applies to all interstate interexchange telecommunications services and *therefore requires CMRS providers to provide the interstate interexchange CMRS service on an integrated basis in all their states.*"[40]

The Commission cannot maintain the CMRS rate integration policy in force on the ground that it was adopted in response to a petition for reconsideration or *ex parte* filings. Courts have held that an agency may not "'bootstrap' notice from a comment."[41] Moreover, the agency cannot fix notice deficiencies on reconsideration.[42] Each substantive rule adopted in a rulemaking must be the logical outgrowth of a notice of proposed rulemaking that provided fair notice of the subject and permitted meaningful comment by those affected before the rule is adopted, not afterward.[43] Reconsideration is not a substitute for following proper rulemaking procedure.

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[39] Although there were several *ex parte* filings on the CMRS issue after GTE filed its petition, none were cited by the Commission in its *Reconsideration Order,* and they were submitted after the period for filing petitions for reconsideration and have not been incorporated into to the record. *Reconsideration Order* at ¶ 18. Accordingly, these *ex parte* filings do not constitute a full and adequate airing of the issues.

[40] *Reconsideration Order* at ¶ 18 (emphasis added).

[41] *See, e.g., Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *American Federation of Labor v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985).

[42] *See National Tour Brokers Ass'n,* 591 F.2d at 901.

[43] *See Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("Something is not a logical outgrowth of nothing. The notice of proposed rulemaking contains nothing, not the merest hint, to suggest that the Department might tighten its existing practice of allowing substitution."). The "logical outgrowth" test looks to whether an agency's final standards are so different from the proposed standards as to require a new notice and comment period. *See, e.g., National Mining Ass'n v. MSHA*, 116 F.3d 520, 531 (D.C. Cir. 1997); *Florida Manufactured Housing Ass'n v. Cisneros*, 53 F.3d 1565, 1576 n.4 (D.C. Cir. 1995). Notice is inadequate when "the interested parties could not reasonably have 'anticipated the final rulemaking from the draft [rule].'" *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994).

2. The *Report and Order* Failed to Provide CMRS Providers With Notice That They Were Subject To Rate Integration

The *Report and Order* confirms the conclusion that CMRS providers were not within the scope of the *NPRM*. When the Commission released its *Report and Order* in August 1996, it adopted its proposed rule (Section 64.1801(b))[44] but made no mention of any expansion of the scope of the pre-existing rate integration policy to cover CMRS carriers. The rule appeared simply to codify the *status quo*, consistent with congressional intent.[45]

The *Report and Order* adopted rules which for the first time required rate integration for Guam, the Northern Marianas, and American Samoa.[46] Because rate integration was being applied to these areas for the first time, the Commission recognized the clear need for a transition period for the six companies providing service to these areas. Specifically, the FCC "decided to require AT&T, Sprint, MCI, IT&E, GTE, and PCI to submit preliminary and final plans to achieve rate integration . . . by August 1, 1997" — approximately one year after adoption of the *Report and Order*.[47] This treatment is consistent with the Commission's early rate integration orders which phased-in new rate integration requirements over time.[48]

If the Commission intended to subject CMRS carriers to rate integration for the first time, CMRS providers also should have been given a one-year transition period. Just like providers of service to U.S. territories subject to rate integration for the first time, CMRS providers need a transition period to convert existing rate schedules and re-program billing and related software. Rates and billing systems cannot simply be revamped overnight. Because CMRS is not mentioned

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44 *See* 47 C.F.R. § 64.1801(b).

45 *See Report and Order*, 11 F.C.C.R. at 9588.

46 *Id.* at 9599.

47 *Id.* at 9599, 9604-05.

48 *See, e.g., Establishment of Domestic Communications-Satellite Facilities, Second Report and Order*, 35 FCC 2d at 857; *Integration of Rates and Services, Memorandum Opinion, Order and Authorization*, 61 FCC 2d at 386.

in the *Report and Order* and CMRS providers were not given a transition period, the *Report and Order* did not provide notice that CMRS was subject to rate integration.

Although the *Report and Order* specifically stated that AMSC was subject to the rate integration requirement, this statement appeared limited to MSS providers.[49] The discussion regarding AMSC does not mention CMRS and merely responds to arguments specific to MSS. The FCC's discussion of AMSC certainly did not put the CMRS industry on notice that all CMRS carriers were subject to rate integration, given that domestic satellite services had long been subject to rate integration, unlike terrestrial CMRS. To the contrary, the fact that AMSC is a provider of satellite service and was specifically subjected to rate integration by name, after considering company-specific arguments regarding the difference between its service and other domestic satellite services, indicates that the Commission did not give any consideration to subjecting CMRS licensees to the rate integration requirement *en masse.*

Moreover, MSS is a *nationwide satellite* service similar to the interexchange satellite service that originally gave rise to rate integration. Non-MSS CMRS providers, on the other hand, offer *regional* service and are not authorized to offer service to all U.S. states and territories. Thus, the FCC's acknowledgment that nationwide satellite service is subject to rate integration is inapposite to whether CMRS was subject to rate integration.

3. Because No Record was Compiled, the Commission's Decision Does not Have a Supportable Record Basis

The record in this proceeding cannot support application of the rate integration policy to CMRS carriers because *there is no record* on this issue. There is no record showing that such a policy is needed, whether it will serve the public interest, or how it will affect the industry and the public. There is no record regarding how rate integration should be implemented (if at all) in the CMRS industry, which is organized very differently from the traditional wireline long-distance

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[49] *See Report and Order*, 11 F.C.C.R. at 9589.

industry, how rate integration can be implemented in this industry, or whether rate integration should be applied on a unitary basis to all CMRS operations of a given company, or separately to the various CMRS services, which operate in very different competitive circumstances.

No party submitted substantive comments suggesting the policy be extended to CMRS, and on reconsideration only one entity, GTE, even raised the issue, apparently only to illustrate the unintended breadth of the scope of the affiliation rule for traditional wireline interexchange carriers. The three *ex parte* letters — one by CTIA against inclusion of CMRS and two by the state of Hawaii in favor of inclusion — were filed after the period for filing petitions for reconsideration, but in any event do not appear to have been relied on by the Commission in its *Reconsideration Order*. Moreover, based on the face of the *Reconsideration Order*, they clearly have not been incorporated into the record. Thus, the Commission must reconsider its decision and place this issue out for full notice and comment to compile the record necessary to make such an industry-altering change, if indeed it believes, on reflection, that extension of rate integration of CMRS interexchange services is necessary.

The Supreme Court has held that agency decisionmaking must include an examination of "the relevant data," and that in reaching a decision it must establish a "rational connection between the facts found and the choice made."[50] This the FCC has not done. It has not examined the relevant data regarding whether to extend the rate integration policy to CMRS because it never compiled the relevant data in the first instance. Thus the choice made — applying the rate integration rule to CMRS carriers and their affiliates — has no rational relationship to the facts found because no facts have yet been gathered. The decision was thus arbitrary and capricious and without basis. An agency action is "arbitrary and capricious if it rests upon a factual premise that is unsupported by

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[50] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

substantial evidence."[51] In the absence of *any* evidence here, the FCC cannot arbitrarily extend the rate integration policy simply upon the premise that "many CMRS providers provide telephone exchange service and exchange access as defined by the 1996 Act."[52]

Moreover, the APA affords review of informal rulemaking on the basis of the record, and it is on that basis that FCC decisions must be justified.[53] Here the absence of a record on this issue makes justification of the Commission's decision impossible, since any reviewing court is left without any relevant factors to consider.[54] Having made no record finding that CMRS carriers should be subject to the rate integration policy, the Commission was in no position to impose such a decision representing a radical departure from the previous application of the policy. Courts have held that any agency must "address[] the significant comments made in the rulemaking proceeding . . . and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review."[55] Having failed to properly put this issue out for notice, and thus having failed to receive and compile a record upon which to base its decision, has left the FCC with an appealable decision. Accordingly, BellSouth urges reconsideration of this issue.

C. Extension of Rate Integration to CMRS Is Contrary to the Public Interest

The implementation of rate integration for CMRS interexchange service is a dramatic change in policy which will ultimately harm consumers, the supposed beneficiaries of the policy. The inevitable result of the Commission's rejection of the market-based pricing arrangements that have governed CMRS in the past will be diminished consumer choice, lessened competition, and increased prices. Indeed, the application of the Commission's policies to the intertwined ownership

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51 *Center for Auto Safety v. FHA*, 956 F.2d 309, 314 (D.C. Cir. 1992); *see* 5 U.S.C. § 706.

52 *Reconsideration Order* at n.52.

53 *See* 5 U.S.C. § 706; *Center for Auto Safety v. FHWA*, 956 F.2d 309, 314 (D.C. Cir. 1992).

54 *See State Farm,* 463 U.S. at 43.

55 *Telocator Network of America v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982).

structure of the CMRS industry would appear to require nationwide coordinated pricing or even price-fixing amongst competitors, as discussed below. Also, by requiring all affiliated CMRS licensees under a single parent to be rate-integrated with respect to their interexchange offerings, the Commission diminishes or eliminates carriers' ability to pursue different pricing strategies for incumbent cellular and new PCS offerings, and to develop local price structures that respond to the needs of each market.

The Commission has long acknowledged the need for market-specific pricing. For example, in its various roaming decisions, the Commission has steadfastly refused to require that a CMRS carrier charge the same rates for roaming in every market.[56] Cellular carriers compete vigorously in their marketing efforts on the basis of their roaming footprint and roaming rates.[57] If CMRS carriers were required to integrate their roaming rates in all markets, their ability to differentiate themselves from their competition would be severely limited. As Commission Chong has noted, such a result "may actually serve to lessen overall competition in the CMRS market."[58]

In short, the public interest would be undermined by subjecting CMRS providers to rate integration, which would effectively subject CMRS providers to rate regulation contrary to existing Commission policy. The Commission has held that tariff regulation of CMRS rates was inconsistent with the public interest. Specifically, the Commission determined that forbearance was warranted because a tariff filing requirement in a competitive environment would have the following detrimental effects:

- take away carriers' ability to make rapid efficient responses to changes in demand and cost, and reduce incentives for carriers to introduce new offerings;
- impede and remove incentives for discounting since all price changes are public, which can therefor be quickly matched by competitors;

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56 *See CMRS Interconnection Second Report,* 11 F.C.C.R. 9462.

57 *Id.* at 9498 (separate statement of Commissioner Chong).

58 *Id.*

- facilitate tacit collusion.[59]

The Commission noted that by prohibiting CMRS carriers from filing tariffs, CMRS carriers would be "motivated to win customers by offering the best, most economic *service packages*."[60]

Extension of rate integration to CMRS would inhibit CMRS providers from competing based on "service packages" that involve interexchange services. Moreover, CMRS rate integration will create the problems the Commission thought it eliminated by detariffing CMRS.

D. The Commission Should Not Jeopardize the Availability of CMRS Toll-Free Calling Plans

The subjection of CMRS providers to rate integration could have the effect of forcing carriers to discontinue or significantly curtail the availability of highly popular service packages that provide the customer with wide-area toll-free calling or low-cost roaming service. BellSouth urges the Commission to make clear that these plans are not subject to rate integration, thus allowing carriers to offer plans tailored to consumer demand on a market-by-market basis.

1. Wide-area Toll-free CMRS Calling Plans Are Commonly Available and Serve the Public Interest

Many CMRS carriers have developed market-specific toll-free calling plans that permit customers, either for payment of a monthly fee or for no monthly fee, to extend their local toll-free calling area to larger regions or particular areas, with calls to such locations being billed for airtime only, without a toll charge. These toll-free calling areas are not necessarily contained in a single MTA and can even span multiple MTAs. BellSouth offers plans in various markets that allow subscribers to make interstate, interexchange calls for the same price as a local CMRS call, and approximately 45,000 BellSouth CMRS customers subscribe to such interstate wide-area toll-free calling plans.

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[59] *Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1479 (1994) (*CMRS Second Report*).

[60] *Id.* at 1479.

For example, BellSouth offers a rate plan in one of its PCS MTAs that permits subscribers to make calls anywhere in North Carolina, South Carolina, and eastern Tennessee for a flat rate of $20 per month. In its Mobile, Alabama, cellular MSA, BellSouth offers a rate plan which permits subscribers to place calls to and from three Florida counties for the price of a local call. In Memphis, Tennessee, BellSouth cellular customers can call anywhere in Mississippi or Tennessee for a flat rate of $4.95 per month. In each case, the customer pays only the standard airtime rate for each minute of calling, with no toll charge, as with a completely local call. Similar plans are offered in many other BellSouth markets, as well as by BellSouth's competitors.

The Commission has found the establishment of such calling plans to be in the public interest.[61] For example, when the Commission detariffed CMRS, it said it expected that CMRS carriers would be "motivated to win customers by offering the best, most economic *service packages*."[62] Moreover, in the 1996 Act Congress sought to make such plans more broadly available. During the consideration of the Senate Bill, S. 652, which was the origin of the 1996 Act (including Section 254(g)),[63] Senator Ashcroft made clear his understanding that one of the underlying purposes of the legislation was to permit all CMRS carriers to offer end-to-end service without restriction:

> In each service area, some carriers can offer customers one price for all calls whether they are local or long distance. Some carriers cannot. The [current] law says so.
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> * * *
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> In fact an interesting case developed that led to an incredible situation in Arizona. The non-bell cellular carrier could offer the entire state in Arizona as a local call. The Bell affiliate could not, bound by the rules that govern wire transmissions. When the non-Bell operator sold its license to another Bell affiliate, that Bell affiliate, having purchased the cellular company, could no longer offer the entire state as a local call. . . . So on one day, the cellular customer in Flagstaff could

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61 *Craig O. McCaw*, 9 F.C.C.R. at 5851-52, 5859-60, 5872-73, 5877, 5879-80; 10 F.C.C.R. at 11,800.

62 *CMRS Second Report*, 9 F.C.C.R. at 1479.

63 *See* Joint Explanatory Statement at 128-32.

call Tucson for the price of a local call. Because the company that he was using was bought by a Bell company, the next day they were charged long distance rates.

Now the customers in Arizona were denied substantial savings. . . . It is that simple. That kind of officious intermeddling, micromanagement is counterproductive, distorting competition rather than promoting competition, and costs consumers benefits.

* * *

Mr. President, once again, Congress must act to correct this senseless policy. Parity had to be reinstated and Congress had a choice. Either we lift all restrictions on cellular carriers so that there be a level playing field, allowing cellular phone operators and proprietors of cellular companies, saying any call you make is like a local call. Or we could extend the artificial restrictions to all carriers.

Now, the bill that we have here lifts those restrictions. *The bill lifts all restrictions on the cellular industry and allows the cellular provider to say: Go ahead, make a long distance call for the same price as a local call.*

Congress acts in its proper role, and the FCC is instructed to implement that policy.[64]

Similarly, Senator Breaux also expressed the view that the 1996 Act expressly permits all CMRS carriers "to offer the full range of *end-to-end* interLATA services."[65] Thus, Congress viewed the 1996 Act as authorizing CMRS providers to offer end-to-end services — cellular or PCS bundled with long distance for the price of a local call.

2. Rate Integration Will Jeopardize CMRS Calling Plans

If CMRS providers are subject to rate integration, some of their wide-area calling plans and roaming plans might be subject to the rate integration policy. These calling plans are jeopardized by rate integration because the service offered does not fit the mold of traditional interexchange services. Calling plans permit customers to make what would otherwise be long-distance calls in the same manner, and for the same or similar charges, as a purely local call. To the extent these plans are considered interstate "local exchange service" they would not be subject to rate integration,

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[64] 141 Cong. Rec. S8159 (daily ed. June 12, 1995) (statement of Senator Ashcroft) (emphasis added).

[65] 141 Cong. Rec. S1311 (daily ed. Feb. 27, 1996) (statement of Senator Breaux) (emphasis added).

but to the extent they are considered interstate "interexchange service" they would be subject to the rate integration policy. If this occurs, multi-market CMRS providers would, as a practical matter, have to discontinue the plans.

For example, subscribers in BellSouth's Birmingham, Alabama, cellular market are offered a rate plan that treats calls from Birmingham to Atlanta, Georgia as toll free. This plan is offered to subscribers in Birmingham because of the community of interest between Birmingham and Atlanta; a large number of Birmingham residents regularly travel to Atlanta. These calling plans offer benefits similar to the EAS or ELCS arrangements that have expanded wireline telephone customers' local calling areas and are fundamentally local exchange, not interexchange service.[66] The principal differences between CMRS calling plans and the similar wireline arrangements are that (a) the CMRS plans have been developed and implemented through market mechanisms instead of regulation and (b) the CMRS plans cover different areas, usually much larger than wireline extended calling areas, in light of the mobile nature of CMRS usage.

Each CMRS rate plan is tailored to reflect the specific characteristics of each market; they cannot be offered uniformly or universally. These plans are developed in response to a carrier's unique abilities in a region and its customers' unique regional demands. If market-specific pricing plans for integrated service packages are barred, consumers will be denied the benefits of calling

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[66] *See Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service,* CC Docket 96-159, *Memorandum Opinion and Order,* FCC 97-244 at ¶ 1 n.4 (July 15, 1997) ("A local calling area consists of one or more telephone exchanges and is an area within which subscribers can place calls without incurring any additional charge over their regular monthly service charge. . . . Local calling areas are established by state regulatory commissions. . . . ELCS (also known as extended area service or EAS) allows local telephone service rates to apply to nearby telephone exchanges, thus providing an expanded local calling area."); *Blocking Interstate Traffic in Iowa,* 2 F.C.C.R. 2692, 2692 n.2 (1987) ("In an EAS arrangement, a customer in one exchange can call a local number in another exchange that is part of the extended area without paying a toll charge. An exchange subscriber in one exchange can therefore access an interexchange carrier's network toll free by calling its seven-digit access number even if that interexchange switch is located in a different exchange. Exchange switches typically recognize such calls as EAS calls, not as interexchange calls for which access charges are applicable.").

plans that meet their needs. A one-size-fits-all policy means that *all* consumers will be disadvantaged.[67]

II. CMRS PROVIDERS SHOULD NOT BE REQUIRED TO INTEGRATE RATES ACROSS AFFILIATES

The Commission did not require a given CMRS provider to integrate only its own rates; the Commission also decided that rates must be integrated across affiliates. Given the ownership structure of the CMRS industry, the integration of rates across affiliates is simply not achievable in the CMRS industry, much less consistent with the public interest. The fact is that cross-affiliate rate integration, if it could be accomplished practicably and lawfully, would largely eliminate competition with respect to interexchange CMRS rates.

One characteristic of the CMRS industry is joint ownership of systems by multiple companies on a market-by-market basis. Partners or joint venturers in one market are competitors in another. The requirement that CMRS affiliates integrate their rates will force competitor after competitor to become locked into identical, non-competitive rates due to common ownership of systems in other markets.

As PrimeCo has shown, the new rate integration policy appears to require PrimeCo's owners, AirTouch, U S WEST, and Bell Atlantic, all to have the same interexchange rates for their CMRS operations as PrimeCo.[68] Moreover, the affiliation rule's daisy-chain effect would expand the required uniformity of interexchange rates to partners of those companies. PrimeCo notes that Frontier would appear to be swept into the mandatory cartel by virtue of a partnership with Bell Atlantic,[69] but it could extend much farther. AT&T and AirTouch jointly own a number of cellular

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[67] As a practical matter, it is impossible to have the same wide area calling plans for multiple markets. Plans must be tailored to the unique communities of interest in each market. Distances between relevant communities of interest will vary with each market.

[68] PrimeCo Motion for Stay of Enforcement at 8 (Sept. 23, 1997).

[69] *Id.*

systems through CMT Partners, potentially requiring AT&T's interexchange CMRS rates to be the same as those of PrimeCo and those affiliated with it. BellSouth would also be brought under the uniform rate requirements because of its joint ownership with AT&T of Los Angeles Cellular Telephone Company and Houston Cellular Telephone Company.

Thus, the current CMRS rate integration rule appears to require uniform interstate interexchange CMRS rates for AT&T, BellSouth, Bell Atlantic, Frontier, PrimeCo, and U S WEST, and the web of uniformity will undoubtedly extend even further.[70] Some of these companies have nearly national coverage standing alone.[71] The daisy-chain effect of the affiliation rule would appear to require a single rate plan for all of these companies that literally will extend nationwide, stifling competition.[72]

Carriers would be unable to lower their rates in the future, or offer new and innovative pricing options, unless such changes were implemented on essentially an industry-wide, coordinated basis. The net result would be to convert a highly competitive environment benefitting consumers into a noncompetitive environment. BellSouth would not be able to offer consumers a lower or different rate for interexchange CMRS service unless that rate was offered not only in every BellSouth market but also by all other companies in the affiliation daisy-chain. Such a result disserves the public interest and would appear to require price-fixing or other coordinated, parallel pricing arrangements that would *per se* violate the Sherman Act.[73] The Commission in this very docket has previously condemned what appears might be coordinated national pricing of

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70 *See* Attachment A.

71 *See* Attachment B (maps prepared by FCC regarding A/B Block auction results, showing cellular and PCS coverage for several companies).

72 *See* Attachment C (showing combined areas of cellular and PCS coverage from the maps in Attachment B.

73 *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 344-48 (1982); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 218 (1940).